

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEPHEN L. KAYSER and GLORIA
YOUNG, individually and as husband and
wife,

Plaintiffs,

v.

WHATCOM COUNTY, a political subdivision
of the State of Washington; DAVID S.
McEACHRAN, Prosecuting Attorney for
Whatcom County in his official capacity,

Defendants.

CASE NO. C18-1492-JCC

ORDER

This matter comes before the Court on Defendants' motion to dismiss Plaintiffs' amended complaint (Dkt. No. 17). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and DENIES in part the motion for the reasons explained herein.

I. BACKGROUND

The facts of this case have been detailed in a previous order and the Court will not repeat them here. (*See* Dkt. No. 14.) Plaintiffs allege that Defendants denied Plaintiff Stephen Kayser ("Kayser") his rights to due process and a fair trial when they failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (Dkt. No. 15.) Plaintiffs also

1 claim that Defendant Whatcom County is liable for the violations of Kayser’s constitutional
2 rights under *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). (*Id.* at 13–
3 16.)¹

4 Defendants removed the case to this Court, and moved to dismiss Plaintiffs’ complaint
5 pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 9.) The Court dismissed
6 Plaintiffs’ complaint without prejudice and with leave to amend. (Dkt. No. 14.) Plaintiffs filed an
7 amended complaint (Dkt. No. 15), which Defendants now move to dismiss. (Dkt. No. 17.)

8 **II. DISCUSSION**

9 **A. Motion to Dismiss Legal Standard**

10 The Court may dismiss a complaint that “fails to state a claim upon which relief can be
11 granted.” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain
12 sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.
13 *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim has facial plausibility when the plaintiff
14 pleads factual content that allows the court to draw the reasonable inference that the defendant is
15 liable for the misconduct alleged. *Id.* at 678. A plaintiff is obligated to provide grounds for his or her
16 entitlement to relief that amount to more than labels and conclusions or a formulaic recitation of the
17 elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). “[T]he pleading
18 standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than
19 an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678.

20 **B. Violation of *Brady v. Maryland***

21 A violation of *Brady* deprives a person of his or her constitutional right to due process.
22 *Brady*, 363 U.S. at 88. Thus, plaintiffs may sue governmental actors under § 1983 for *Brady*
23 violations. *See id*; *United States v. Agurs*, 427 U.S. 97 (1976). In order to do so, a plaintiff must
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25 ¹ Plaintiffs originally brought suit against prosecutor Eric T. Richey and Defendant
26 McEachran in their individual capacities. (Dkt. No. 1-1.) Plaintiffs’ amended complaint removed
Richey as a party and names Defendant McEachran only in his official capacity.

1 prove three components: “The evidence at issue must be favorable to the accused, either because
2 it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the
3 State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene*, 527
4 U.S. 263, 281–82 (1999).

5 Plaintiffs’ complaint asserts that the *Brady* evidence was favorable to Kayser because it
6 would have impeached the central prosecution witness, it was withheld by Defendants, and the
7 alleged withholding prejudiced Kayser in the state criminal proceedings. (*Id.* at 5–9.) Suppressed
8 or withheld evidence “that would impeach a central prosecution witness is indisputably favorable
9 to the accused.” *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009). Plaintiffs allege that
10 nearly all the evidence against Kayser in his underlying criminal case was the testimony of Mark
11 Adams, a process server who claimed Kayser assaulted him. (Dkt. No. 15 at 5, 8.) As such,
12 evidence that would impeach Adams’s credibility or reveal past complaints against him that
13 required residents to defend themselves would be indisputably favorable to Kayser. (*Id.* at 9.)
14 Indeed, the Prosecutor dismissed the charges against Kayser after his defense counsel was
15 granted permission to admit examples of Adams’s past conduct and evidence that the State
16 declined to charge at least one person whose property Adams had entered. (*Id.* at 7–8.)

17 The “terms ‘suppression,’ ‘withholding,’ and ‘failure to disclose’ have the same meaning
18 for *Brady* purposes.” *Benn v. Lambert*, 283 F.3d 1040, 1053 (9th Cir. 2002). Plaintiffs contend
19 that the Prosecutor did not provide the *Brady* evidence to Kayser’s defense attorneys, even when
20 they specifically requested it. (Dkt. No. 15 at 7–8.) As such, Plaintiffs claim that the undisclosed
21 evidence of Adams’s similar “bad conduct” was “highly relevant” to the state court’s
22 determination of whether Kayser acted in self-defense, (*id.* at 9), and that Defendants failed to
23 disclose evidence that their “sole witness had created fear and apprehension in others under
24 similar circumstances justifying self-defense.” (*Id.* at 13.)

25 Whether prejudice resulted from the suppression of *Brady* evidence depends on whether
26 it is material to the guilt or innocence of the defendant. *Kyles v. Whitley*, 514 U.S. 419, 434

1 (1995) (holding materiality is gauged by whether *with* the evidence, a “reasonable probability”
2 exists that a different outcome would have ensued). Kayser argued in his state criminal
3 proceeding that his alleged assault of Adams was caused by Adams’s own frightening and
4 bizarre conduct. (See Dkt. No. 15 at 4–8.) Plaintiffs further assert that the Whatcom County
5 Prosecutor or Sheriff’s Office had records of similar incidents where Adams caused those to
6 whom he was serving process to act in self-defense or to call law enforcement. (*Id.*) Therefore,
7 Plaintiffs have pled factual allegations that raise their claim for violation of *Brady* above the
8 speculative level, and Defendant’s motion to dismiss is DENIED as to this ground.

9 Plaintiffs seek damages from Defendant Whatcom County (“the County”) for the alleged
10 *Brady* violation under *Monell*. (See Dkt. No. 15.) While a prosecutor is individually protected by
11 absolute immunity for decisions made within the exercise of prosecutorial functions, *Broam v.*
12 *Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003), a constitutional violation may be properly attributed
13 to a governmental entity when an official, such as a prosecutor, acts pursuant to a municipal
14 policy or a widespread practice. *Monell*, 436 U.S. at 694. Whether Plaintiffs have sufficiently
15 pled *Monell* liability claims against the County is discussed below.

16 **C. *Monell* Liability of the County**

17 A municipal entity may be held liable for its agents’ constitutional violations under
18 § 1983 “when execution of a government’s policy or custom, whether made by its lawmakers or
19 by those whose edicts or acts may fairly be said to represent official policy, inflicts the
20 injury” *Id.* Plaintiffs may seek injunctive relief and compensatory damages for
21 constitutional harms, but municipalities are immune from punitive damages under § 1983. *City*
22 *of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 254 (1981).

23 Courts have recognized three additional ways a plaintiff may demonstrate a policy
24 resulting in *Monell* liability: when the municipality fails to or inadequately trains its employees,
25 *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); when a policymaking official ratifies the
26 unconstitutional conduct of a subordinate, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127

1 (1988); and when a municipal official with final policymaking authority takes action or makes a
2 decision that results in the deprivation of constitutional rights. *Gillette v. Delmore*, 979 F.2d
3 1342, 1349 (9th Cir. 1979).

4 Plaintiffs allege that the County is liable for the alleged *Brady* violations under *Monell*
5 because: (1) the County had an official policy that erroneously defined *Brady* evidence; (2) the
6 Prosecutor demonstrated a custom or practice of the County by withholding *Brady* evidence on
7 more than one occasion in Kayser's case; (3) the County failed to train its employees regarding
8 disclosure of *Brady* evidence; and (4) official policymakers for the County acted to deprive
9 Kayser of his constitutional rights by withholding *Brady* evidence. (Dkt. No. 15 at 6, 9–10, 13–
10 15.) The Court examines each theory in turn.

11 1. Official Policy

12 Courts have recognized that at the pleading stage, plaintiffs are unlikely to have access to
13 official government policies. *See, e.g., Thomas v. City of Galveston, Texas*, 800 F. Supp. 2d 826
14 (S.D. Tex. 2011). However, in order to survive a motion to dismiss, plaintiffs must plead
15 “[f]actual allegations [that are] enough to raise a right to relief above the speculative level.”
16 *Twombly*, 550 U.S. at 555. Plaintiffs’ first complaint generally alleged the existence of an
17 unconstitutional *Brady* policy, (Dkt. No. 1-1 at 12), which the Court dismissed as insufficient to
18 establish a plausible claim. (Dkt. No. 14 at 6.) Plaintiffs’ amended complaint alleges that the
19 County maintains an official policy that erroneously defines *Brady* evidence as “only evidence
20 for the possible impeachment of government employees” and that as a result of this policy, the
21 Whatcom County Sheriff’s Office and Prosecutor’s Office failed to disclose the evidence of
22 Adams’s prior similar conduct to Kayser’s counsel or “with each other.” (Dkt. No. 15 at 9–10,
23 12.) Plaintiffs do not allege specific facts about the policy other than that its existence and that
24 the County’s definition of *Brady* evidence is incorrect. *See id.* In the absence of more specific
25 factual allegations, Plaintiffs’ claim of a right to relief from the County based on an official
26 policy does not rise above speculative level. Therefore, Defendants’ motion to dismiss is

1 GRANTED on this ground.

2 2. Practice or Custom

3 An unconstitutional practice may result in municipal liability when the decisions and
4 actions of municipal officials are “so permanent and well settled [that they] could constitute a
5 custom or usage with the force of law.” *Monell*, 436 U.S. at 691. In order to establish a practice
6 or custom, plaintiffs must allege more than “isolated or sporadic incidents.” *Trevino v. Gates*, 99
7 F.3d 911, 918 (9th Cir. 1996). Plaintiffs must allege practices of such “sufficient duration,
8 frequency and consistency,” that the practice has “become a traditional method of carrying out
9 policy.” *Id.*

10 Plaintiffs assert that the County’s unconstitutional practice is evidenced by the Prosecutor
11 or Sheriffs’ failure to disclose the *Brady* evidence on more than one occasion in Kayser’s state
12 court criminal proceedings. (Dkt. No. 15 at 6–7, 13.) But Plaintiffs have not provided factual
13 allegations that the Prosecutor’s and the Sheriff’s Offices failed to disclose *Brady* evidence in
14 other cases. Plaintiffs’ complaint fails to allege more than an isolated or sporadic incident, as
15 opposed to an established practice or custom. *Id.* Therefore, Plaintiffs have not plausibly alleged
16 *Monell* liability and Defendant’s motion to dismiss is GRANTED on this ground.

17 3. Failure to Train

18 For *Monell* liability to reach a municipality on a failure to train claim, a plaintiff must
19 demonstrate that the municipality was on notice of constitutional violations and made a
20 “conscious or deliberate choice” not to act that “amounts to deliberate indifference to the rights
21 of persons with whom the [county officials] come into contact.” *Flores v. Cty. of Los Angeles*,
22 758 F.3d 1154, 1158 (9th Cir. 2014) (internal citations omitted). Further, in order to demonstrate
23 deliberate indifference, plaintiffs must ordinarily show “[a] pattern of similar constitutional
24 violations by untrained employees.” *Connick v. Thompson*, 563 U.S. 51, 62 (2011).
25 “Contemporaneous or subsequent conduct cannot establish a pattern of violations.” *Id.* at 563
26 U.S. at 65.

1 A pattern of similar violations may not be necessary to demonstrate deliberate
2 indifference when a single constitutional violation is so obviously the consequence of a
3 municipality's failure to train. *Id.* at 63. However, "failure to train prosecutors in their *Brady*
4 obligations does not fall within the narrow range" of cases that the Supreme Court had
5 previously hypothesized may allow for "single-incident liability." *Id.* at 64 (explaining that a
6 "licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady*
7 material" does not present the same obvious constitutional danger posed by other cases, such as
8 training police on the use of lethal force).

9 Much of Plaintiffs' amended complaint describes actions taken by the individual
10 prosecutor in Kayser's case. (Dkt. No. 15 at 13.) But Plaintiffs' failure to train claim focuses on
11 a failure to train the County's sheriffs on *Brady* evidence. (*Id.*) To the extent that Plaintiffs'
12 failure to train theory is supported by the individual prosecutor's actions, it cannot proceed in the
13 absence of a pattern of *Brady* violations by other prosecutors. *See Connick*, U.S. 563 at 64
14 (holding that a failure to train prosecutors in their *Brady* obligations was *not* one of the few
15 circumstances where the need for training would be "obvious"). Plaintiffs allege that the
16 individual prosecutor failed to disclose or produce *Brady* material when asked twice in Kayser's
17 state criminal proceedings. (Dkt. No. 15 at 11.) However, contemporaneous or subsequent
18 actions by a prosecutor may not be used to demonstrate a pattern to support a failure to train
19 theory. *Connick*, 563 U.S. at 65.

20 Plaintiffs assert that Defendants "implemented or tolerated plainly inadequate . . .
21 training, supervision, and/or discipline concerning the constitutional duty of police investigators
22 to make timely disclosure [to the prosecutor and defense counsel] of *Brady* material." (Dkt. No.
23 15 at 13.) Plaintiffs further assert that the County's policymaking officials had notice of the need
24 to provide *Brady* training based on Supreme Court, U.S. Court of Appeals, and Washington
25 Court of Appeals case law and "the inherent obviousness of the need to train . . . law
26 enforcement officers" in their *Brady* obligations. (*Id.* at 14–15.)

1 Plaintiffs' allegations are insufficient to establish a pattern of similar constitutional
2 violations that would have put the County on notice of the need to train its sheriffs about
3 disclosure requirements under *Brady*. Plaintiffs do not allege any facts showing a deliberate
4 choice by the Sheriff, Prosecutor, or other County official to fail to implement adequate training
5 of Whatcom County's Sheriffs on *Brady* requirements. Rather, Plaintiffs' complaint discusses
6 the Sheriff's conduct regarding *Brady* evidence solely in the context of Kayser's criminal
7 proceedings when Defendant McEachran allegedly said he had not been given the evidence by
8 the Sheriff's Office. (Dkt. No. 15 at 8.) As with the individual prosecutor, even if an individual
9 sheriff had withheld such evidence from the prosecutor more than once in Kayser's criminal
10 proceedings, contemporaneous or subsequent acts do not satisfy the general requirement to show
11 a pattern of violations that would have put the County on notice as required for a failure to train
12 claim. *Connick*, 563 U.S. at 65.

13 The amended complaint fails to plausibly allege *Monell* liability on a failure to train
14 theory because it does not allege facts showing the County was "on notice" of the need for
15 further training or that there was an obvious need to train either prosecutors or sheriffs on *Brady*.
16 Therefore, Defendant's motion to dismiss is GRANTED on this ground.

17 4. Acts of Official Policymaker

18 While a county official's act or decision may be attributable to a county, "not every
19 decision by municipal officers automatically subjects the municipality to § 1983 liability."
20 *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482–83 (1986). In addition to possessing discretion
21 for certain decisions and functions, the official must "also be responsible for establishing final
22 government policy" with respect to the official's specific action before the municipality may be
23 subject to liability. *Id.* The district court's determination of whether an individual is a final
24 policymaker for purposes of *Monell* is based on state law. *Jett v. Dallas Independent School*
25 *District*, 491 U.S. 701, 737 (1989). The role of the individual should not be determined by title,
26 but rather by considering whether he or she had final policymaking authority "in a particular

1 area, or on a particular issue.” *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997).

2 Plaintiffs allege that Whatcom County’s Prosecuting Attorney, Sheriff, and their
3 authorized delegates are final policymakers because they have “final authority for training,
4 instructing, supervising, and disciplining law enforcement and legal personnel” and that the
5 Sheriff’s Office bases its *Brady* policies on advice from the Whatcom County Prosecuting
6 Attorney. (Dkt. No. 15 at 9, 15.) Plaintiffs have not cited a statutory ground in their complaint
7 establishing that prosecutors are final policymakers in the context of providing advice to the
8 Whatcom County Sheriff’s Office. (*See generally* Dkt. No. 15.) Plaintiffs cite Revised Code of
9 Washington § 36.27.020 in their response to Defendants’ motion to dismiss. (*See* Dkt. No. 23.)
10 However, Revised Code of Washington § 36.27.020 does not make reference to prosecutors
11 possessing authority to make policy for a county office. *See* Wash. Rev. Code § 36.27.202(2)
12 (stating prosecutors shall “be legal adviser to all county and precinct officers”). Thus, Plaintiffs’
13 complaint does not plausibly establish that the Prosecutor acted with final policymaking
14 authority when he allegedly advised the Sheriff’s Office about *Brady* evidence. Therefore,
15 Defendants’ motion to dismiss is GRANTED on this ground.²

16 **D. Malicious Prosecution**

17 Plaintiffs bring a common law claim of malicious prosecution against Defendant
18 McEachran in his official capacity. (*See* Dkt. No. 15 at 1.) Official capacity suits “generally
19 represent only another way of pleading an action against an entity of which an officer is an
20 agent,” *Monell*, 436 U.S. at 690 n. 5. Conversely, personal capacity suits allege personal liability
21 and seek damages from the individual who took actions under color of state law. *Kentucky v.*
22 *Graham*, 473 U.S. 159, 165 (1985).

23 A prosecutor acting within the scope of his or her duties in initiating or pursuing a
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25 ² Because Plaintiffs have failed to cite a statutory basis supporting their argument that the
26 Prosecutor is a policymaker for the County, the Court declines to address Defendants’ arguments
that prosecutors are state officials instead of county officials.

1 criminal prosecution is absolutely immune from civil suits for malicious prosecution arising
2 under common law or § 1983. *See Imbler v. Pachtman*, 424 U.S. 409, 421–29 (1976) (reviewing
3 absolute prosecutorial immunity from malicious prosecution suits at common law, and holding
4 that same immunity applies to claims brought pursuant to § 1983). The Court notes that
5 Plaintiffs’ claim is substantively the same as its first complaint, which the Court dismissed. (*See*
6 Dkt. No. 14.) Further, Defendant McEachran’s actions as a prosecutor are “intimately associated
7 with the judicial phase of the criminal process” and therefore are accorded absolute immunity from
8 Plaintiffs’ claim. *See Imbler*, 424 U.S. at 421–29, 430. Therefore, Defendant’s motion to dismiss is
9 GRANTED as to Plaintiffs’ malicious prosecution claim.

10 **III. CONCLUSION**

11 For the foregoing reasons, Defendants’ motion to dismiss (Dkt. No. 17) is GRANTED in
12 part and DENIED in part. Plaintiffs’ claims are DISMISSED without leave to amend.

13 DATED this 14th day of March 2019.

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A handwritten signature in black ink, reading "John C. Coughenour", written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE